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IN THE

Supreme Court of the United States

No. 179—October Term, 1949.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

S.S. AUSTRALIA STAR et al.,
And Six Other Proceedings.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE *S.S. AUSTRALIA STAR* AND FREDERICK LEYLAND & CO. LTD., RESPONDENT, IN OPPOSITION.

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STATEMENT.

1. *The Nature of the Case.*

The opinion below is reported at 172 F. (2d) 472. The opinion of the District Court, Southern District of New York, is reported at 74 F. Supp. 145.

Both of those opinions disclose that this is essentially a case of a marine collision on the night of September 9th, 1944, involving the respondent's steamer *Australia Star,*

petitioner's merchantman *Hindoo,* and petitioner's naval vessel *PC-616,* which was escorting the *Hindoo.*

Like any other collision case, the basic question is the negligence of the persons in charge of the several vessels which caused or contributed to the collision.

The "key" fact of the case is that, although the vessels were originally proceeding at night without showing any lights, in accordance with wartime practice, the *Australia Star* switched on her two white range (masthead) lights and her red and green side lights, at full brilliance, 12 minutes before the collision, when she and the *Hindoo* were 3 to 4 miles from each other. From that fact, which was corroborated by the *PC-616* and found by both courts (R. 607, 656), stems the negligence of the *Hindoo* and the *PC-616.* The *Hindoo* was held in fault for her admitted failure to see and heed the *Australia Star's* navigating lights and for continuing blacked out, at full speed, until she suddenly appeared out of the darkness, in the act of throwing herself into collision across the bow of the lighted *Australia Star* (R. 657-658). The *PC-616* was held in fault for her failure to signal the warnings or orders, which she could and should have given, to either of the other vessels when she admittedly saw, by her radar, that her darkened convoy, the *Hindoo,* maintaining the course and speed previously ordered by the *PC-616,* was standing into collision with the *Australia Star,* in blind disregard of the latter's lights (R. 659-660).

The lower court affirmed the contributory negligence of the *Australia Star* on the ground that, although her master had switched on her navigating lights 12 minutes before collision, and although the earlier reports from his radar operator had indicated that the vessels were not on collision courses, he was negligent in not asking his radar

operator for additional reports which might have disclosed the danger of collision created by the faulty navigation of the unlighted *Hindoo* (R. 659).

Petitioner does not now question the negligence found against the *Hindoo* (petition, p. 8, footnote), but seeks a review by this Court in an effort to exonerate the *PC-616*.

2. *Outline of the Proofs.*

The *PC-616* and *Hindoo,* having been in a group convoy starting from Guantanamo Bay, Cuba, were detached therefrom on the morning of September 9, 1944, under orders to proceed independently to Cartagena, Colombia (R. 176). Those orders, if in writing, were not disclosed herein. It is self-evident that they were not included in the *unproven new matter* now injected into the petition, as an appendix thereto. However, the Commanding Officer* of the *PC-616* testified that, under those orders, her duties included not only protection against enemy attack but also direction of the *Hindoo's* navigation by fixing the base course and speed, the duty to safeguard the *Hindoo,* and the responsibility to get her to her destination safely (R. 182-224). In the performance of those duties, he had wartime authority to give an emergency order to any Allied merchant vessel (R. 224). Before leaving Cuba, he had been supplied with information regarding Allied vessels which would be proceeding, blacked out at night, through the general area (R. 226). Such information was presumably furnished to aid the PC-616 in guarding against the dangers of night time

* The Commanding Officer naturally testified regarding "his" orders and "his" duties; but it is sufficiently evident that it was the *PC-616*, with all of her complement and equipment, that was ordered to escort the *Hindoo* and not merely the individual who happened to be in command at the time. As this Court stated in *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215, at 224, the *in rem* principles of Admiralty treat a vessel as a juristic person, liable for acts and *omissions* brought about by her personnel.

collision with darkened allied vessels known to be in those waters.

The fact that the *PC-616's* duties were properly understood and described by her Commanding Officer must be inferred from the petitioner's failure to offer any proofs in contradiction of his testimony.

In addition to her military armament, the *PC-616* had elaborate equipment of signal lamps, signal lights, searchlights, siren, radio, and a loud speaker for means of communication by signal or voice, and also radar equipment for detecting the distant approach of surface craft (R. 178-181). Her radar antenna was operated mechanically, making a complete sweep of the horizon every few seconds, and giving a steady "sight" of objects in all directions (R. 216).

Some 23 minutes before collision, while the *Hindoo* was maintaining a base course of 108° true and a speed of 10 knots, *as ordered by the PC-616,* the latter's radar picked up, at a distance of 8 miles, an object which later proved to be the *Australia Star* (R. 182, 586). The *PC-616* could and should have determined by radar that the *Australia Star* was approaching on a course which, projected, would cross the course of the *Hindoo;** but, without alerting the *Hindoo's* men as to the approach of another vessel and the possible necessity of altering course or speed to avoid collision, the *PC-616* speeded across the path of the on-coming *Australia Star,* thus putting herself and her convoy on opposite sides thereof (R. 210).

When the *PC-616* was crossing ahead, and after she was off the port bow of the *Australia Star,* she "blinkered" to that vessel a "challenge", in reply to which the *Australia Star* "blinkered" her call sign, thus identifying herself as

* The *Australia Star* was then on a course 237° true (R. 281).

a friendly vessel (R. 185, 349). While drawing off the port side of the *Australia Star,* the *PC-616* began "blinkering" a message "Keep clear", of which the *Australia Star* was able to decipher only the first word, probably because of the unorthodox technique of the *PC-616's* signalman (R. 343, 350, 264-265).* The *Australia Star* kept signalling for repetition of the message so that the *PC-616* was fully aware that her message had not "gotten through" or been deciphered (R. 192-194, 264-265, 350-351).

While the "blinkering" was in process, the *PC-616* saw the *Australia Star* turn on her navigating lights (R. 586); and, from that moment, the *PC-616* knew from her radar that the darkened *Hindoo,* maintaining the course and speed which the *PC-616* had ordered, was standing on into collision, in blind disregard of the navigating lights of the *Australia Star* (R. 222, 580, 589). The Commanding Officer of the *PC-616* admittedly realized that something was wrong. He thought that the *Hindoo* either had failed to see or had misunderstood the lights of the *Australia Star* (R. 212-213). Some 5 minutes before collision, he became alarmed, but did nothing except continue the undecipherable "blinkering" to the *Australia Star.* Finally, when the two merchantmen were in the jaws of collision, the *PC-616* threw a searchlight upon the *Hindoo,* but too late to avoid disaster (R. 196-197).

The *PC-616* could handily have stood over and communicated with the *Australia Star* by loud speaker (R. 225). Moreover, either of the two merchant vessels could have been ordered quickly to stop by the international danger signals "U" or "K", each of which is a 3-flash signal, easily given in a few seconds by Aldis lamp, signal light, search-

* As bearing on the negligence of the *PC-616,* she had no reason to assume that such a message would have been of any help, even if it had been deciphered, because it did not indicate what the *Australia Star* was to keep clear of, or how she was to do it.

light, or whistle, and easily read and immediately understood (R. 218, 324, 340, 344). Neither of those signals was given by the *PC-616* to either the *Hindoo* or the *Australia Star* (R. 218).

Thus, on her own testimony, although the *PC-616* had ample knowledge of the impending danger of serious disaster, she did not take any of the elementary precautions which she could and should have taken to avert it. The testimony amply supports the lower court in its statement, "We think this was negligence for which the *PC-616* should be held accountable not only to the *Hindoo* but to the *Australia Star,* which she permitted to remain a target for the onrushing darkened *Hindoo*" (R. 662).

The negligent navigation of the *Hindoo* is fully discussed in the opinion of the lower court and in the opinion of the District Court, and further discussion here may be unnecessary, particularly as the petitioner no longer questions her negligence.

The *Australia Star's* radar was a primitive type, secreted by the British Admiralty in a special structure abaft the navigating bridge. The antenna, operated by hand, required about 3 minutes for a complete sweep of the horizon, giving information only in the direction in which it might be focussed at any given time (R. 420, 421, 426, 431). Commencing 27 minutes before the collision, 3 radar reports from the radar operator indicated to the *Australia Star's* Master, by reason of changing bearings and distances, that the vessels were not on collision courses (R. 281, 284, 285, 288). Nevertheless, as an additional precaution, during the "blinkering" between his vessel and the *PC-616,* he turned on his navigating lights at full brilliance (R. 286, 314). That was done, 12 minutes before collision, according to the

Australia Star's time, as found by the lower court and the District Court (R. 286, 607, 656). When the *Hindoo* failed to turn on her navigating lights in reply, the Master of the *Australia Star,* in reliance on wartime practice, concluded that his radar information was accurate, and that the *Hindoo,* in no danger of collision, was withholding her lights rather than risk disclosure to any enemy submarine (R. 318). Because of the facts outlined above, and in view of the *PC-616's* failure to give any danger signal, the Master of the *Australia Star* was not disturbed by the difficulty of deciphering the *PC-616's* message. He had reason to believe, from previous experience, that a patrol vessel was attempting to send him some message with respect to his approach to the Canal (R. 319, 329-330). He had not the slightest reason to anticipate that the darkened *Hindoo* would navigate into collision with him, and the sudden appearance of the unlighted *Hindoo* off his starboard bow, out of the darkness, in the very jaws of collision, was a complete surprise.

The lower court affirmed the finding of the District Court that the *Australia Star* contributed to the collision on the ground that her Master, after turning on her lights, was negligent in not asking his radar operator for additional reports which might have disclosed the danger created by the *Hindoo's* faulty navigation. If, in the existing circumstances, such an omission constituted contributory negligence of the *Australia Star,* the omissions of the *PC-616* established her contributory negligence quite as strongly.

3. *The petition goes completely outside of the record in an effort to support the question presented.*

The "question presented," as stated on pages 2-3 of the petition, should be broken down into two parts, thus:

(a) that Naval vessels, when escorting wartime convoys, are under no duty whatsoever except to afford to their convoys military protection and defense against enemy action (Petition, p. 13); (b) that, therefore, no matter how negligent a Naval escort may be in failing to avert a known danger of an impending collision between her convoy and an approaching vessel, no liability can attach to the United States because there is no breach of a litigable duty (Petition, p. 15).

The pleadings filed by the United States did not plead any such contention (R. 38-39, 74-75, 136, 156), and the record is completely barren of any proof in support of the facts on which it is predicated. In contradiction of it, the Commanding Officer of the *PC-616*, a witness for the United States, testified, as outlined above, that, in escorting the *Hindoo*, the *PC-616* had duties with respect to the navigation and safety of the *Hindoo*, which, *prima facie*, were in addition to and quite apart from military protection, were not dependent upon enemy attack, and were *continuing duties* even if no enemy were encountered. In the face of that uncontradicted testimony, the petitioner has gone completely outside of the record in an effort to lend tenuous support to the "question presented". It is stated on pages 5 and 13 of the petition that the orders under which the *PC-616* was escorting the *Hindoo* were contained in the "Escort Order", appended to the petition on page 20. There is not the slightest evidence to support that statement. Moreover, that document, on its face, did *not* contain the orders under which the *PC-616* was operating at the time of this collision. It related solely to "group" maneuvers of a convoy of numerous units escorted by numerous Naval vessels while leaving Guantanamo. It is self-evident that *additional* orders must have been given when the *Hindoo* and *PC-616* were later detached from that

"group" convoy, to proceed independently to Cartagena (R. 176).

Neither do the proofs offer the slightest justification for petitioner's reference to statements issued by the Navy Department in 1948 and 1949. No proof of them was offered in this case, and there is nothing to show that they are material to the questions involved herein in any way.

This respondent respectfully submits that the petitioner is subject to the most serious criticism in the attempt to seek the aid of this Court by such unwarranted and improper methods. For that reason, even if there were no other, the petition should be denied.

4. *The District Court did not absolve the PC-616 from lack of due care.*

The District Judge itemized the precautions which the *PC-616* could have taken which might have avoided the disaster (R. 599, 602-603), but held that her failure to take them was "not such negligence as the *Australia Star* could complain of" (R. 603), because he thought that the *PC-616* had the status only of a "volunteer." Thus, when the lower court reversed the District Court as to the escort's duties and liabilities, both courts were in agreement as to lack of proper precautions by the *PC-616*.

The petition (pp. 9, 10, 16) emphasizes the District Court's comments that the *PC-616* did not bring about the collision by affirmative action: but those comments have no bearing upon the *PC-616's* liability for the precautions which she *omitted*. A vessel may be liable for faults of *omission*, as the lower court stated (R. 660, 661).

FIRST POINT.

THE QUESTION PRESENTED BY THE PETITIONER IS NOT ONLY UNSUPPORTED BY THE PROOFS BUT ALSO CONTRARY TO PREVIOUS JUDICIAL INTERPRETATIONS OF THE DUTIES OF A NAVAL ESCORT.

The petition repeatedly confuses the *purpose* of wartime convoy operations and the *duties* which devolved upon the Naval vessels in carrying out those operations. Thus, on page 10, there is the statement that the *purpose* was to meet and defeat the enemies' submarine and air offensive,—a fact which is not at issue or disputed in this litigation. But, when merchant vessels were compelled, by Government authority, to sail in convoys organized and operated by the Navy, and were compelled to submit themselves to the orders of the Naval escorts, including orders with respect to courses, speeds, blackout of lights, etc., it is certainly a *prima facie* inference that the success of those operations necessitated that the Naval escorts perform duties in addition to combatting enemy attack. What those duties were, as then known to both the escort and merchantman, is a question of fact, to be proven. The petitioner now asserts the "question presented" as though it were some sort of legal axiom requiring no more support than unwarranted references to statements made by the Navy Department in 1948 and 1949; but, as previously discussed herein, *the proofs* in this case support the decision below, and do not support the petitioner's contention.

There is serious error in the misleading and erroneous statement in the petition (p. 11) that the lower court "has now held that the United States has accepted liability * * * for failure of the officers of such escort vessel to *supervise with a high degree of care* the navigation of the escorted

merchant vessels so as to prevent collision between them and any other vessels they may meet." (Italics ours.) *The lower court made no such ruling.* If the statement quoted were correct, it could have been said that the *Hindoo* should be deemed free from fault because she was subjected to faulty supervision by the escort. But the *Hindoo* was found in fault on the basis of her own liability for faulty navigation.

The lower court, referring to the uncontradicted testimony of the *PC-616's* duties, simply held that she had a duty to make reasonable efforts to avert a collision which she knew to be impending when she saw that the darkened *Hindoo,* while maintaining the course and speed which the *PC-616* had ordered, was blindly rushing on to disaster.

Moreover, it would seem sufficiently apparent that the negligence of the *PC-616 did not* arise "out of combat activities," and that the argument and cited authorities on pages 18-19 of the petition have no relevancy to the case at bar.

In *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215, the steamship *Cavelier* was ordered by naval authorities to follow the guidance of the naval patrol boat *YP 249* in proceeding through the peaceful waters of Delaware Bay. The fault charged against the *YP 249* was that she guided the *Cavelier* so negligently that the latter struck upon a submerged wreck. This Court held that the libel stated a cause of action against the United States under the Public Vessels Act both *in personam* and *in rem.* The relationship between the *YP 249* and the *Cavelier* was that of escort and convoy, and it is self-evident that the escort's duties and responsibilities were not limited to protecting her convoy against enemy attack. If the petition seems to suggest that the duties of the escort in that case rested upon the specific orders under which she was operating, this respondent

again emphasizes that the orders to the *PC-616* were not shown, except in the admissions of her Commanding Officer that the *PC-616,* like the *YP 249, did* have duties in addition to protecting her convoy against enemy attack.

In the English case of *The Sobieski,* 81 Lloyd's List L. R. 51, the Court expressly held that the duties of a naval escort went beyond the protection of her convoy from military attack, and that "the escort was responsible for insuring in so far as possible that the convoy reached its destination safely, without sustaining damage by enemy attack or by collision with surface craft while navigating at high speed in fog." In that case the naval escort, having radar knowledge of the approach of another vessel upon a collision course, negligently failed to warn her convoy of the necessity of altering course or speed to avert collision. The finding of negligence was affirmed by the Court of Appeals, 82 Lloyd's List L. R. 370, and the ultimate disposition of the case turned upon peculiarities of the English law and procedure not pertinent to the present litigation, as the petitioner herein admits (Petition, pp. 15-16, footnote).

Other reported cases disclose that naval escorts, in addition to military protection, had further duties, particularly the duty to warn their convoys of any change of course necessary to avoid collision with an approaching vessel. *Esso Standard Oil Co.* v. *United States,* 174 F. (2d) 182, 184; *Empire Opossum,* 81 Lloyd's List L. R. 204, 212; *The Lima,* 69 Lloyd's List L. R. 111, 112; *The Delilian,* 80 Lloyd's List L. R. 448, 451-452.

SECOND POINT.

THE DECISION BELOW IS SUPPORTED BY UNCONTRADICTED PROOFS. THE CASE PRESENTS NO QUESTION OF SUCH GRAVITY OR IMPORTANCE AS TO REQUIRE A REVIEW BY THIS COURT.

For the reasons already discussed, the Court below based its decision *upon the proofs in the case* as to the duties of the three vessels and the negligent breach thereof.

Having determined that the collision resulted from the negligence of all three vessels, the Court below rightly decreed that the United States, as owner of the *Hindoo* and *PC-616,* should carry two-thirds of the total damages and the *Australia Star* one-third. The petition does not dispute that that ruling is in accordance with established law. *The Eugene F. Moran,* 212 U. S. 466, 475; *The Kookaburra,* 69 F. (2d) 71; *The Socony No. 123,* 78 F. (2d) 536; *The Norwich Victory,* 77 F. Supp. 264.

In stating that the two-thirds liability of the United States would be "without limitation of liability" (R. 662), the Court below was merely giving effect to the rule that, when two vessels of similar ownership contribute to a disaster, their owner may not seek statutory limitation of liability (46 U. S. C. A. 183) without surrendering the value of his interest in both vessels. *The Alvah H. Boushell,* 38 F. (2d) 980, 982; *The San Rafael,* 141 Fed. 270, 276.

The limitation proceedings of the United States in the present litigation were based solely upon the offer to surrender the value of its interest in the *Hindoo,* represented by pending freights in the sum of $39,498, the *Hindoo* herself having been a total loss (R. 42-48). The United States, having been held liable for the negligence of both the *PC-616* and the *Hindoo,* could not seek to limit that

liability without surrendering the value of its interest in the *PC-616* as well as the value of its interest in the *Hindoo*.

When the United States came into court and initiated the litigation herein by asserting its claim against the *Australia Star* and her owner (R. 15) the Government so far took the position of a private suitor as to agree by implication that justice be done with regard to the subject matter, —the collision. *United States* v. *Thekla*, 266 U. S. 328, 339-340; *The Steel Inventor*, 24 F. (2d) 657, 659. Section 3 of the Public Vessels Act (46 U. S. C. A. §783) recognized that rule by giving to a private owner the right to cross-libel in any suit originated by the United States.* In determining the justice of the subject matter,—the liability for the collision,—it is immaterial whether the contributory negligence of the *PC-616* arose out of a duty owed to both the *Hindoo* and the *Australia Star*, as the lower court held (R. 662), or out of a duty owed only to her convoy, the *Hindoo*. In either event, the *PC-616's* negligence contributed to the collision.

The record herein presents a situation in which the lower court, having determined the question of negligence upon the proofs, decreed the liability of the vessels and their owners in accordance with established principles. There is no reason why the case should be reviewed by this Court more than any of the numerous collision cases decided by the lower court from Term to Term.

Neither is there anything inequitable in the decision below to justify a review. No sound reason appears either within or outside of the record why the United States

* This section of the Act would be meaningless except in that it recognized the *Thekla* ruling with respect to private owners who might be unable to obtain jurisdiction in a direct suit against the United States.

should be relieved from liability for the consequences of the negligence of its servants, as to which the Public Vessels Act was intended to provide a remedy.

If the petitioner were to succeed in its effort to escape liability for the contributory negligence of the *PC-616,* the total damages would lie between the *Hindoo and the Australia Star* on the basis of "mutual fault", and each would normally be called upon to carry 50%. But the United States would then be entitled to limit its liability to the aforesaid value of its interest in the *Hindoo.* At the same time, the owners of cargo lost on the *Hindoo,* asserting damages of more than $600,000 (R. 65, 95), would be entitled to recover 100% thereof from the non-carrying vessel *Australia Star. The Sucarseco,* 294 U. S. 394, 400-401. Frederick Leyland & Co. Ltd., by reason of payment to the *Hindoo's* cargo, and the *Australia Star's* damages of upwards of $400,000 (R. 33) would be saddled with a total damage of approximately $1,000,000, without any possibility of recouping 50% from the United States, because of the latter's limitation of liability. Thus, despite the gross negligence of the *Hindoo* and the contributory negligence of the *PC-616,* the *Australia Star* and her owner would be left "holding the bag." This respondent does not suggest that liability in any case depends upon the amount involved. It *does* contend that petitioner should not be permitted to seek the aid of this Court towards such an inequitable result without submitting the strongest proofs in support of its petition. Such proofs do not exist in this case.

Conclusion.

Although the writ of certiorari is asked for herein solely on the question presented, the petitioner suggests, in a footnote, that, if the writ be granted, the United States will ask

this Court to review other questions in the case. If that be proper practice under the rules of this Court this respondent submits that it should be entitled to ask this Court to review the finding of contributory negligence of the *Australia Star*, in the event that the present petition is granted.

Nevertheless, for the reasons stated herein, the petition should be denied.

Respectfully submitted,

ROBERT S. ERSKINE
Counsel for respondent, Frederick Leyland & Co. Ltd., and *SS Australia Star*

Dated New York, July 28th, 1949.